No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Washington, Southern Division.

ANSWER BRIEF OF DEFENDANTS-APPELLANTS,

Kostelac and Maryland Casualty Company.

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SUBJECT INDEX.

Cases Cited.

Textbooks and Treatises Cited.

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SUMMARY OF ARGUMENT.

We believe that plaintiff has found it cannot justify the decision of the lower Court on the basis stated by that Court, to-wit: that defendant Kostelac acquiesced in the contract mistake by his failure to "demand" a recission. The cases are believed to hold otherwise.

Consequently, counsel for plaintiff seek to uphold the decision of the trial Court on three grounds, on all of which the Court has previously ruled contrary to their views. The first ground deals with the motive of defendant Kostelac in attempting to get out of his contract, and we show that the evidence strongly supports the trial Court's upholding of Kostelac's motive. Counsel's effort to impute other motives by reason of Ceiling Prices and failure to start up the new hog farm we believe are simply not warranted by the evidence, and the trial Court was in the best position to pass upon disputed factual testimony.

Next plaintiff would support the lower Court's decision by an assertion that defendant Kostelac was negligent. The evidence is overwhelmingly against such contention, and in fact shows plaintiff's agent to be in great part responsible for the error. Further, even negligence in such circumstances may not deprive one of a right to rescind.

Finally plaintiff attempts to justify the decision by reason of two provisions in the Invitation to Bid. The first, purporting to be an estimate that each man wastes only .04 pounds per day, is not binding in this case, and the testimony shows it rightly was never taken seriously. It is not even a good "admission" to be considered by the trier of the facts. The other provision in the Invitation was one which warned the bidders that there might be great variances in the number of men at Fort Lewis *after* the contract began, and stated that the contract price would not be conditioned thereon. We submit that plaintiff has taken certain of these words out of context in an effort to show that this clause was intended to be a forfeiture of a bidder's right to rescind a mistaken contract. The lower Court agreed with us on the interpretation of both of these provisions. If we are correct in this assump-

tion, we must also be correct in claiming there is no relation, by analogy or otherwise, between this latter contract clause and an "as is, where is" contract provision. The latter, at any rate, could apply only where specific, existing, property is involved.

The brief reference to the "acquiescence" theory by counsel for plaintiff is much different from the lower Court's grounds. Counsel require only a "prompt assertion of the right to rescind", which undoubtedly was fully proved in the present case. "Prejudicial delay", an essential element of plaintiff's theory, is lacking from the pleadings, Pre-Trial stipulation and proof. And under the circumstance plaintiff, by requesting, and even insisting upon, the delay involved, has never been in a position to, and never has heretofore, claimed such a prejudicial delay.

ARGUMENT.

A reading of plaintiff's original brief herein makes it plain that counsel find it impossible to justify under the decisions, Federal or State (and there is no conflict among them), the sole basis given by the trial Court for its ruling, viz.: that defendant Kostelac waived his right to rescind the contract because of "acquiescence", and his failure to "demand that the contract be declared at an end" (Tr. 196). No discussion of this acquiescence theory is made by counsel in the entire brief until and except the two pages (25-27), on Point II, C, and, as we will show later, this point is entirely different from the ground of the lower Court.

Counsel, therefore, primarily attempt to uphold defendants' liability upon three other and distinctly different grounds, none of which were found for plaintiff in the lower Court, and on each of which the lower Court held contrary to counsel's views. We believe that the trial Court's Findings on each of these three other points are based upon very substantial (we think overwhelming) evidence, largely from seeing and hearing the witnesses in Court, but also fortified by the stipulation of the parties in the Pre-Trial Order.

I. PLAINTIFF'S IMPLICATIONS OF OTHER MOTIVES TO DEFENDANT KOSTELAC TO RESCIND CONTRACT ARE CONTRARY TO THE EVIDENCE.

A. **Lifting of Ceiling Prices Improved the Contract, Rather Than Make It Burdensome.**

The first of these three new points embraces attempts to assign to Kostelac other motives besides this contractual mistake for wanting to get out of this agreement. In pre-

paring this appeal, counsel have gone to considerable lengths for the first time to delve into the question of Ceiling Hog Prices in the Federal Register, for the purpose of reconstructing some ulterior, secret motive on the part of defendant Kostelac, and hence to discredit his sworn testimony which the lower Court believed.

We cannot understand how counsel consider an argument of this calibre valid on this appeal, much less of such importance as to constitute the first major argument in the brief. It would be a questionable "argument to the jury" in a lower-Court hearing, in view of the fact that there was *not a word of evidence introduced* concerning this rise in market prices, and not even a hint to defendant Kostelac on the long cross-examination (Tr. 144-171), that this price rise was claimed to have been a disadvantage to him.

This point could have validity only if the evidence introduced showed that as the market price of hogs went up and Kostelac *got more money for his hogs*, the corresponding slight increase in the price of garbage *would cost the defendant more than the market price rise*. There is not only no scintilla of evidence to this effect, but the assumption is absolutely incorrect. The evidence shows that these market price increases are of great benefit to hog farmers, and that defendant Kostelac wanted nothing more than for these prices to rise exactly as they did (Tr. 175). The end of price control was obviously anything but a surprise to the parties, since they entered into a sliding-scale bid, which could apply only if prices could go up (Exhibit 1).

The fallacy of trying to impeach a witness for the first time on appeal, and the fallacy of this type of empirical reasoning can even be proved mathematically by a study of the relevant portion of this sliding scale as shown in the contract in question (Exhibit 1):

Selling Price of Hogs on Seattle Market	Price Bid by Kostelac in Contract
$0.15 per pound	$0.09 per man per mo.
0.16 per pound	0.10 per man per mo.
0.17 per pound	0.12 per man per mo.
0.18 per pound	0.135 per man per mo.
0.19 per pound	0.14 per man per mo.
0.20 per pound	0.145 per man per mo.

Any increase in market price of hogs above 20¢ per pound obviously would require no increase in the contract price, and would be a definite pecuniary advantage to Mr. Kostelac.

The average price of hogs, as shown in Exhibit 3, rose from $.158 per pound under O. P. A. Ceilings (Plaintiff's brief, p. 15); reached this very top figure of 20¢ per pound immediately during the first month of the contract; and *continued to climb, so that by the month of October, 1946, while this contract dispute was in full force, the average market price was $.26 per pound.* Defendant Kostelac was therefore by October getting a bonus of six cents per pound over and above the 20¢ price on which his maximum contract price was based. He was paying not a cent more for garbage because of this additional six-cent increase in the market value of his hogs. As a matter of fact, Exhibit 3 shows the market price of hogs was on its way up, and went up constantly for the next year, and the market even got up to 31¢ per pound in that time.

This means that at the very time during which plaintiff now attempts for the first time to attribute an ulterior motive to Kostelac to get out of his contract, Kostelac was already making 26¢ per pound for his hogs, which included this 6¢ bonus. Far from seeking "escape from the burdens of his contract" for the motive suggested by counsel on page 17 of their brief, Kostelac would have had a very good contract by reason of the lifting of OPA Ceiling

Prices, if the original mistake therein had not caused him to double his price.

Plaintiff's own figures, therefore, rather than impugn defendant's motive, furnish further convincing proof of the existence of an original, grave error in the contract.

B. Kostelac's Delay in Setting Up New Farm Close to Fort Lewis Was the Effect of the Contract Dispute, Not a Cause.

Similarly plaintiff seeks to impugn the motives of defendant Kostelac, in spite of the lower Court's finding in Kostelac's favor on that point, by claiming that the defendant could not perform his contract because he had no hogs. This is a distortion of the facts, and confuses cause with effect. And it starts out with the premise that a man would prefer to dump garbage for 5½ months on the ground (about three million pounds, as we figure it), rather than operate a farm.

The testimony did not show such an absurdity, but showed that defendant Kostelac, in getting the Fort Lewis contract, had planned and arranged to operate on a different farm from the one at Gig Harbor (Tr. 173). This Gig Harbor farm had been near Bremerton, where Kostelac had had the garbage contract for the past year, but was quite a distance from Fort Lewis, and it required "quite an overhead" expense for the double ferry tolls on each trip, and the impractical mileages involved (Tr. 161). The new farm at Roy, Washington, very near Fort Lewis (Tr. 141), had been lined up, and was made available to defendant Kostelac when he bid on the Fort Lewis contract (Tr. 173), and hogs were available for stocking that farm. Plaintiff simply cannot dispute Mr. Kostelac's plan to set up this farm at Roy, Washington, since *Kostelac told the Government about it in his own handwriting on the last page of the contract (Exhibit 1)*!!

For three weeks defendant Kostelac hauled the garbage all the way to Gig Harbor (Tr. 158). After that he closed up his farm there, according to plan, and sold these hogs. However, instead of immediately setting up the new farm near Fort Lewis, he changed his plans and decided temporarily to dump garbage (Tr. 173). Defendant Kostelac testified positively that he made such change in plans *only because of this dispute over his contract* (Tr. 173), and he proceeded to dump the rest of the garbage from then on at a complete loss to himself.

This testimony was believed by the Court, and is certainly plausible. Defendant could hardly be expected to open up the new farm while he was still in the dark as to whether the Government agencies were going to try to impose on him a double price for garbage; and he could scarcely be criticized for deciding to take the relatively small loss (principally in labor) of disposing of the garbage by dumping, rather than start out the entire new enterprise on impossible price terms.

We think he did the honorable and right thing in devoting all his energies to "*persistently pursuing efforts* to have the Government modify, adjust, or cancel his contract" (Tr. 61—Pre-Trial Order), spending over $2,000 in trips, and even asking help from his Congressman. But even these persistent efforts brought nothing. Defendant was put off again and again. More time passed. No action came from the Government Bureaus, until it was the latter part of November, and he was still dumping the garbage at a complete loss while trying to get a decision.

The last one to criticize Mr. Kostelac for holding up his new farm operations and paying out of his own pocket the labor incident to dumping, while he did his utmost to clear up the contract, should be the Government.

C. The Trial Court Believed the Testimony as to Motive, From Seeing the Witnesses and Substantial Evidence.

It goes without saying that the trial court was in the best position to judge defendant Kostelac's motives, from seeing him answer the barrages of questions on the witness stand. We have never seen a witness more straight-forward and honest on the stand, even under the most searching cross-examination (Tr. 144-171), and if there should be any doubt of this, we refer the Court to eleven instances of actual misstatement of his testimony on cross-examination in an effort to trip him up, and in each of which cases he told the whole truth, and never wavered or permitted any misstatements of fact. See: Tr. 151, lines 13-14; Tr. 155, lines 2-3; Tr. 156, line 5; Tr. 156, lines 8-10; Tr. 156, lines 17-18; Tr. 163, last 3 lines; Tr. 164, lines 4-9; Tr. 165, lines 6-7; Tr. 165, line 22; Tr. 165, last 4 lines; and Tr. 170, lines 19-20.

The question of whether defendant Kostelac really made an honest mistake in bidding or whether he had some hidden motive to get out of the contract, as attributed to him by counsel on this appeal, was decided by the lower court in language leaving no room for doubt: "*There is no question* but that defendant Kostelac made an error" (Finding of Fact No. V, Tr. 76). And the trial court determines conclusively the "candor and credibility of a witness" in such a case (*United States v. Gypsum Co.* [1947], 333 U. S. 364, 92 L. Ed. 746, 68 Sup. Ct. 529).

II. DEFENDANT KOSTELAC WAS NOT NEGLIGENT.

A. The Evidence Overwhelmingly Proves This and the Trial Court So Held.

Plaintiff also persists in the contention that defendant Kostelac was guilty of negligence in his inspection of the garbage containers. There are three answers to this.

First, the facts in the case are overwhelmingly against plaintiff. The testimony shows that defendant Kostelac on *four entirely separate occasions* made very complete examinations of the garbage containers, *carefully inspecting each time approximately 40 to 50 garbage cans,* going in each area of the entire Fort, keeping ahead of the trucks, tilting, examining and estimating the weight of each garbage container, and also finding out the number of men served at each mess hall (Tr. 112-114; 120-123). There being no evidence to the contrary, we cannot understand how it can be claimed the lower court was wrong in holding in its Finding of Fact that defendant was entitled to rescind the contract, as against plaintiff's contention of negligence (Finding of Fact X, Tr. 78).

B. **Plaintiff's Own Agent Contributed on Great Part to the Error.**

Second, plaintiff overlooks the stipulated and agreed fact that the Contracting Officer, himself, told Mr. Kostelac that the garbage was a one-day's accumulation (Pretrial Order, Tr. 60). If there was anyone at Fort Lewis on whose word Mr. Kostelac was entitled to rely 100% it was the one man in complete charge of this bidding and contract. In fact it would be foolhardy to doubt the word of the experienced Contracting Officer and seek information from inexperienced subordinates.

The courts have dealt with this situation frequently, where the statements of one party have been the cause of alleged negligence or carelessness on the part of the other party, and the decisions have always excused any such alleged negligence: *Chitty v. Horne-Wilson, Inc.* (Ga., 1955), 92 Ga. App. 716, 89 S. E. (2d) 816; *Richmond Gas Co. v. Baker* (Ind., 1897), 146 Ind. 600, 45 N. E. 1049; *Williams v. Oklahoma Tire & Supply Co.* (U. S. D. C., W. D. Ark., 1949), 85 Fed. Supp. 260.

In the *Richmond Gas Co.* case, supra, the plaintiff was charged by defendant with being extremely careless in paying no heed to the strong odor of escaping gas. However, it was shown that the agent for defendant gas company had assured plaintiff that there was no danger of explosions. The Court said (l. c. 1051):

> "The company could not thus lull the members of the family into a belief in their security, and then, when injury came, turn on the family and *charge them with negligence in relying on the assurance of safety so given by the company itself.*" (Emphasis supplied.)

Under similar facts involving a furnace explosion, the Court in the *Chitty* case, supra, quoted the well established rule (l. c. 819):

> "If a person is without knowledge as to whether a particular thing is true or not, he ordinarily will act at his peril in representing it to be true."

We think these expressions are applicable to the Kostelac case. At any rate, there is overwhelming evidence of due care by Kostelac to back the finding of the lower court.

C. Even Negligent Mistakes, If in Good Faith, Do Not Necessarily Preclude Rescission.

Finally, there is serious doubt as to whether a negligent mistake, made in good faith, and not involving gross carelessness, will prevent the right of rescission. The modern cases tend to permit rescission in such cases: *Spencer v. Patton et ux.* (Washington Supreme Court), 35 Pac. (2d) 768; *Board of Regents v. Cole,* 209 Ky. 761, 273 S. W. 508. The cases cited by plaintiff (Brief, p. 25) as authority on this point do not have any connection with this subject at all.

III. CONTRACT PROVISIONS DO NOT PRECLUDE OR FORFEIT RIGHT OF RESCISSION.

A. The ".04 Lbs. Per Man Per Day" Provision in the Invitation Is Neither Conclusive Nor Sensible.

The third ground on which plaintiff seeks to justify the lower Court's decision (which is also a point decided against plaintiff by the trial Court), is that the Government's Invitation to Bid contained provisions causing a loss or Forfeiture of the right to rescind. First is a provision which plaintiff describes as an "official estimate" (Brief p. 5), that the garbage yield per man at Fort Lewis would be .04 pound per man per day; and therefore plaintiff asserts that defendant Kostelac is not in a position to claim that he estimated any other amount from his examination of the garbage containers.

The first question that comes to mind is, "Why would the Contracting Officer persist in constant urging in his Invitation to Bid, and verbally, that defendant Kostelac make such complete examinations of the garbage containers, if this statement as to garbage yield was intended to be precise and accurate, or binding?"

But the full answer is shown by the testimony and by mathematics: .04 of a pound per man per day equals 4/100 x 16 ounces, or 64/100 ounces, which is less than ⅔ *ounce per man per day!* The garbage at Fort Lewis was in fact, many, many times any such figure (Tr. 164).

This "official estimate" furnished at least a moment in a lighter vein in the serious trial of this action. A reductio ad absurdum showed that according to such an estimate of .04 pounds per man per day, one could calculate all the garbage from the kitchens *for four meals*, including trimmings, parings, shells, skins, peels, rinds

and cores; plus all the waste at the table; plus any and all spoiled, rotted or rejected food; plus any waste from miscalculations as to quantities or left-overs; apportion this on a per-man basis, and the resulting quantity per man for all four meals could be put in an envelope and mailed for 3¢! As the testimony showed, defendant Kostelac told the Contracting Officer that the peelings from one potato would exceed the ⅔rd ounce daily figure, and the Contracting Officer agreed, laughed, and said to disregard this .04 lb. provision in the Invitation (Tr. 127-128), saying no one could explain where such a figure came from (Tr. 127).

The most that could possibly be said for this remarkable figure that some Government employee ordered put in its Invitation to Bid is that, since such figure was never manually deleted from the Invitation, it could be introduced in evidence as some alleged "admission against interest" by Kostelac. It is nowhere claimed that this "estimate" constitutes any type of contractual agreement. Defendant Kostelac was permitted to, and did completely, explain this alleged "admission" to the satisfaction of the trial Court, and the Court has ruled that this contract was subject to rescission by Kostelac had he acted promptly (Tr. 78).

B. The Provision Stating That Contract Is Not Conditioned Upon Future Variances in Amounts or Men at Fort Lewis Was Never Intended to Deal With Original Mistakes in Contract.

Another ground urged by plaintiff for denying to defendant Kostelac his right to rescind this contract entered into by mistake, is that such right of rescission is taken away by another provision in the contract. The provision claimed to have this forfeiting effect is as follows (Exhibit 1, p. 3; Plaintiff's Brief, pp. 3-4):

> "No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, *WILL NOT VARY DURING THE LIFE OF THE CONTRACT;* and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens, or families, or the number of men subsisted, *FROM TIME TO TIME.*"

This point, we maintain, is also devoid of merit. There are nine words contained in the above contractual provisions which plainly militate against plaintiff's contention. These are the words first emphasized in this quotation above. And following these emphasized words is the word "AND" which carries forward the sense of the entire provision, and points out that in view of the possible future variation during the life of the contract, this contract is not to be conditioned upon the amount of waste, number of kitchens, number of families, or number of men *FROM TIME TO TIME.*

How can the purpose of a clause in a contract be made more obvious and plain? The purpose was simply this: the price of garbage was to be based, not on weight, but on the number of men at Fort Lewis (here it became 14½¢ per man per month). The number of men of course at an army camp might "*vary*" greatly "*from time to time during the life of the contract,*" because obviously the Army could not promise that the camp would be used to capacity "*during the life of the contract;*" it might even be put on a stand-by basis. And the number of kitchens and families would depend on the number of men to be stationed at Fort Lewis. This quoted provision of course was inserted to remind the bidders that there might well be a *future* variation in the number of men, families or kitchens "*from time to time*" "*during the life of the contract,*" and the bidder must consider this fact in making his bid.

The broader language, which plaintiff chooses to isolate, that the contract is not "conditioned" on the number of kitchens, families or men, or the amount of waste "from time to time" directly modifies the language immediately preceding it in the very same sentence, and explains that therefore the bidder may not complain, or get out of his contract because the number of men may "*vary from time to time*" "*during the life of the contract*": that is, *AFTER THE DATE THE CONTRACT BEGINS.*

Plaintiff takes some of these quoted words out of their context, and interprets them to mean that the parties agreed that Kostelac *waived and forfeited in advance* all rights which he might otherwise have under the law, including specifically the right to rescind the contract for any mistake *in the original letting of the contract.* Of course the parties did not contract for any such forfeiture, and the lower Court rightly held against plaintiff on this point.

We have serious doubts whether such a forfeiture would be legal (*Williston & Thompson on Contracts,* Revised Edition, Vol. 6, sec. 1722, p. 4863), particularly where plaintiff contributes to or causes the mistake. Regardless of questions of legality, however, the Courts in construing such provisions will apply the following rules:

(a) "Forfeitures by implication or construction are not favored; and a construction entailing a forfeiture will not be given a contract unless no other construction is reasonably possible . . . The contract will not be construed to provide for a forfeiture unless it is clear, from the language thereof, that the parties intended so to provide . . . " (*Corpus Juris Secundum*, Vol. 17, Sec. 320, pp. 742-743).

(b) "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results" (*Williston on Contracts,* supra, Vol. 3, Sec. 620, pp. 1786-1787).

(c) "The Court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that . . . a construction leading to an absurd result should be avoided" (*Corpus Juris Secundum*, Vol. 17, Sec. 319, pp. 739-741).

(d) "Where words . . . bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed. . . . " *Restatement of the Law of Contracts*, Vol. 1, Sec. 236, p. 328. (Exhibit 1 shows that this Invitation to Bid was drafted by plaintiff.)

Counsel find solace in the assertion that "The waste yield was an uncertainty inherent in the contract and not capable of precise determination." However this may be, it is basic that any contract, *even if its price be determined by estimating,* must not begin with a mistaken premise which causes an honest bidder to offer more than twice as much as the estimated value of the product. Although we heartily concur that once a fair contract is entered into, both Kostelac and the Government thereafter assume some element of risk in future fluctuations *"during the life of the contract,"* we firmly maintain that both parties are entitled to start out with an original contract free from mistake.

(1) Nor Did This Provision Make the Contract Similar to an "As Is, Where Is" Contract.

On page 22 of their brief, counsel arrive at the unique conclusion that the above "variation" clause "bears a close analogy" to a sale of specific property "As Is, Where Is." We respectfully say that such analogy is anything but close. There are two distinct fallacies to this thinking that are fatal to the conclusion:

1) An "As Is, Where Is" clause by its very nature could not conceivably apply, and has never been suggested by *any Court* as applying, except where specific, tangible property is *actually in existence*. In such a case it is perfectly legal for the purchaser to agree to buy that particular property, exactly "as it is." As the Court pointed out in *Maguire & Co. v. United States* (273 U. S. 67), and in the other cases cited by plaintiff, the contract must make it plain that the buyer was "to take his chance on particular property" that was in existence. Where property is not in existence, however, the usual result would be a "sale by sample" in which the buyer could rescind if the goods deviated at all from the samples. [*See American Elastic Co. v. United States* (C. A. 2), 187 Fed. (2d) 109, also cited by plaintiff.]

2) The other fallacy is to construe this "variation" clause in the Kostelac contract to throw on the buyer the risk of a mistake in his original estimate. As we have shown above, this clause was specifically limited to a particular risk: the risk that the future number of troop throughout the long five-year period would vary greatly "from time to time" "during the life of the contract." Hence it could not be a basis in an argument based on "As Is, Where Is" contracts, because the parties had never so contracted.

IV. PLAINTIFF'S ONLY JUSTIFICATION FOR THE TRIAL COURT'S DECISION AS TO "ACQUIESCENCE" IS CONTRARY TO THE EVIDENCE.

A. "Prompt Assertion of the Right to Rescind" Is Conclusively Shown by the Evidence.

We now come to Plaintiff's Point II, C, beginning on page 25 of their brief, which for the first time deals with the general subject of alleged delay by defendant Kostelac, and the general subject of estoppel, waiver or acqui-

essence. We think it is highly significant that counsel offer no support or precedent for the lower Court's extreme holding that defendant Kostelac should have "demanded" rescission after suspecting a mistake. Instead, counsel limit the "acquiescence" theory as follows (Brief, p. 25):

> *"For a unilateral mistake of fact to serve as a basis for rescission of a contract, it is fundamental that equity requires a PROMPT ASSERTION OF THE RIGHT TO RESCIND once the mistake becomes known."*

There is no doubt that this is a correct statement of the law. Under Point I of our principal brief we cited nine different, well established, legal theories predicated upon the need for a "prompt assertion of the right to rescind," but denying that there must be a "demand" of rescission under the facts of this case.

Have we produced evidence in this case on plaintiff's criterion: a "prompt assertion of the right to rescind"? If there is one fact irrevocably established in this case, by the signed stipulation of the parties, it is this very fact: that Mr. Kostelac *promptly asserted his right to rescind.*

Paragraph 18 of the Pre-Trial Order (Tr. 61) shows that within the first ten days after the beginning of this five-year contract, Kostelac had not only notified the Contracting Officer of this mistake, but had already also directly protested to the Sixth Army Headquaters in San Francisco; that written notice from Kostelac's attorney came a few days later; and "that defendant *persistently pursued efforts* to have the Government *modify, adjust or cancel his said contract,* addressing his communications in that respect to both the military and Congressional authorities. . . ."

Without referring to any of the rest of the mass of evidence on this point, it is patently shown by the stipu-

lated facts that defendant Kostelac certainly *asserted his right to rescind*, at the very earliest date possible, and *persistently* thereafter.

In this connection we cannot leave unanswered an extremely misleading statement on pp. 8-9 of plaintiff's brief, in which counsel assert that "after five and one-half months partial performance . . . Kostelac repudiated the contract. . . ." Such an assertion is directly contrary to the *agreed statement of facts* in the Pre-Trial Order showing that immediately after the contract was started (Tr. 61) Mr. Kostelac protested that a mistake had been made, gave the full notice referred to above, and thereafter "persistently pursued efforts to have the Government modify, adjust or cancel his said contract . . ." The "repudiation" was not by Kostelac but by the *Government*, about four months after the mistake was discovered, who, after the extended negotiations, finally told defendant Kostelac his contract would be relet because of his refusal to pay the mistaken and erroneous contract price (Exhibits 4 and 5; Tr. 55).

B. It Is Also Very Doubtful That This Was Merely a Unilateral Mistake.

(1) Both Parties Were Mistaken About an Essential Fact.

Under plaintiff's theory of the case, under this Point II, C, therefore, defendant Kostelac may rescind, even if the mistake had been unilateral. Therefore it is probable that a determination of unilateral v. mutual mistake need not be made. However, we feel that the nature of the mistake should be clarified, without unduly lengthening this brief.

The mistake in the present case is undoubtedly "mutual", rather than "unilateral." The parties, under the

agreed facts, and the testimony, were *both* mistaken as to the fact of whether the garbage examined was a one-day or a two-day accumulation (Tr. 60, 119, 123). This made a difference of over 100% in the price that should be bid for such garbage, so that the mistake involved an essential fact. And it has now been proved that there was a two-day accumulation, by indisputable testimony of Col. Ryer (Tr. 97-106).

Even in cases where the mistakes are largely unilateral in character (as opposed to the facts of the case at bar), the decisions consider the mistake "mutual", where the other party participated to any extent at all in the error, or possibly even invited the error. *Thwing et al. v. Hall & Ducey Lumber Co.*, 40 Minn. 184, 41 N. W. 815; *Lovell v. City of Altus* (Okla.), 246 Pac. 468.

A case that mirrors in many ways the Kostelac case under its facts is *Scott v. Warner* (N. Y., 1870), 2 Lans. 49, where plaintiff desired to buy a ton of hay from defendant. Defendant did not want to weigh the hay, just as the Government did not want to weigh garbage in the Kostelac case. The defendant in that case "represented that seven feet square by five feet in depth would make a ton, and that he knew this fact. The evidence tended to show that such measurement *did not make more than one-half a ton.*" The Court found a *mutual mistake*, with the following comment (l. c. 51):

> "The defendant assumed to know [these measurements for a ton]. If he did not know, then he misrepresented. If he had been so informed, and so believed, and his representations were founded upon such information and belief . . . then he was clearly mistaken, and led plaintiff into mistake. *The Parties were mutually mistaken as to a material fact. This is the most charitable view of the case.*" (Emphasis supplied.)

Alongside this we quote the Pre-Trial Order in the Kostelac case (Tr. 60):

> "That the Contracting Officer for plaintiff relied upon such provisions of the [previous] contract [requiring daily pick-ups], was not personally aware of any violations of the provisions of said contract, *and accordingly stated to defendant Kostelac, prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof . . .*".

(2) Even If the Mistake Were Unilateral, the Cases Permit Rescission Under These Facts.

As stated, since the mistake has been proved to be "mutual" in this case, we shall not unduly extend this brief by discussion of the right to rescind for unilateral mistake: a right possibly not generally understood by many members of the Bar. We merely cite to the Court the leading cases throughout the country, representing the unanimous body of law permitting rescission for unilateral mistake under circumstances such as those in the present case: *Moffett, Hodgkins & Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108, 20 Sup. Ct. Rep. 957; *Donaldson et al., v. Abraham et al.*, 68 Wash. 203, 122 Pac. 1003; *Murray et al., v. Sanderson*, 62 Wash. 477, 114 Pac. 424; *Geremia v. Boyarsky et al.*, 107 Conn. 387, 140 Atl. 749; *School District of Scottsbluff v. Olson Construction Co.*, 153 Neb. 451, 45 N. W. (2d) 164; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500; *Kutsche v. Ford*, 222 Mich. 442, 192 N. W. 714; *Chicago, St. P., M. & O. Railroad Co. v. Washburn*, 165 Wis. 125, 161 N. W. 358; *Board of School Com'rs v. Bender* (Ind.), 72 N. E. 154; *Brown v. Bradley* (Texas Civ. App.), 259 S. W. 676; *Smith v. Mackin*, 4 Lans. (N. Y.), 41; *Chaplin v. Korber Realty, Inc.* (New Mexico), 224 Pac. 396; *Board of Regents v. Cole*, 209 Ky. 761, 273 S. W. 508; *59 A. L. R. 809.*

C. No Change in Circumstances Prejudicial to Plaintiff Was Alleged or Proved.

It is of course an essential element of this point II, C, of plaintiff, in addition to other requirements, that they must show a change of circumstances resulting in detriment to the Government as the result of this alleged delay, and an inability to obtain fair prices for garbage for this same reason. Two important observations must first be made:

1) Each and every one of our arguments under Point I of our principal brief would apply here, and permit rescission by Kostelac in spite of any claim of prejudicial delay. That is, the undertaking of negotiations for settlement by both parties, the mutual expectation of delay during attempted settlements, the appearance that immediate rescission was not expected, the direction to defendant to continue hauling the garbage pending settlement, lack of knowledge of facts by defendant and other equitable circumstances would all constitute an excuse for delaying rescission, even if plaintiff thereby might incur prejudicial results.

2) This question of plaintiff being prejudiced was not pleaded, was not in the Pre-Trial Order, or any other place in the trial of this case and no evidence on this was introduced by either of the parties. The *sole basis* for the lower Court stating that the delay had been prejudicial to the Government is from testimony on page 191 of the transcript which was in response to a side question asked by the Court of plaintiff's witness, DeBoer. That this was not an issue in the case is emphasized by the Court's statement, "If no one else is going to ask it, I will ask it". The witness then answered that he had previously dismantled his hog ranch, and therefore was not in a position to start up immediately.

However, this contention that the Government was prejudiced, and the reasoning of the lower Court to that effect

is without any support from this very evidence: DeBoer's statement that he had dismantled his hog ranch *ON JULY 1, 1946.*

The error in the assumption that the Government was prejudiced by reason of alleged delay by Kostelac from about *July 10, 1946, to November 27, 1946,* becomes very apparent, when one considers that the *only testimony* on the subject, quoted above, was that *ON JULY 1, 1946, the hog ranch of the only other qualified bidder HAD ALREADY BEEN DISMANTLED* (Tr. 191). No prejudice to the Government could possibly have resulted from a delay that did not begin until *after* Mr. DeBoer had completely dismantled his hog ranch, and by the testimony of DeBoer himself it was July 1, 1946, when he dismantled it (Tr. 191). There was no other person whomsoever able to bid on a garbage contract at Fort Lewis.

Finally, the conclusion is inescapable that for plaintiff to claim prejudicial delay caused by defendant Kostelac is to throw all logic to the Four Winds. It was *plaintiff* whose chief agent *requested* Kostelac to continue to haul the garbage *during the delay period* while the dispute was being settled (Tr. 140); it was *plaintiff* whose chief agent *threatened* defendant Kostelac in insisting that he continue hauling during this interval (Tr. 140); it was *plaintiff* whose chief agent *approved the delay* and personally drafted a new contract *correcting* the obvious mistake in the contract, *requesting approval* from higher Army authority (Tr. 61, 135) to straighten out the tangle (for which plaintiff was not free from blame); and it was *plaintiff* whose agents were so unconcerned about "prejudicial delay" that they relet the contract for the entire 4½-year remaining term on only 48 hours' notice to the only other bidder, despite formal decision to relet the contract 19 days before (Exs. 4 and 5). This fact was elicited from their own witness at the trial (Tr. 191). And plaintiff's agent even failed to

permit defendant to bid on a fair contract on December 15, 1946.

In view of the above, it can be seen why plaintiff neither alleged nor introduced any evidence on the matter of "prejudicial delay."

CONCLUSION.

We contend that plaintiff has failed to uphold the trial Court's sole ground for holding defendants liable, and has failed to present any other ground for such liability. We ask that plaintiff's cross-appeal be denied, and that the judgment be reversed as requested in our appeal.

Respectfully submitted,

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